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Nos. 18510 to 18533, 18866 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER *et al.* (24 cases); CATHERINE B. NOLLENBERGER *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING.

To the Honorable, Walter L. Pope, Circuit Judge, Frederick G. Hamley, Circuit Judge, Gilbert H. Jertberg, Circuit Judge:

The United States, by its attorneys, respectfully petitions the court for a rehearing on that portion of the decision and judgment of this court entered on June 24, 1964, requiring the United States to pay indemnity to United Air Lines to the full extent of the judgments in the nongovernment employee cases;[1] and requests that this issue be reheard before the court sitting *en banc*.

1. The issue of indemnity is especially appropriate for a rehearing *en banc*. As the opinion expressly recognized, although the issue of indemnity is governed

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[1]Although this petition pertains only to that issue, the government of course reserves the right to seek review of all adverse portions of that decision.

by the law of Nevada, that State has neither statutory nor case law on the subject (Slip Opinion, p. 25). By placing its decision on its view of the common law prevailing in the majority of American jurisdictions, therefore, the opinion in effect laid down principles which, if allowed to stand, will govern the court's decisions for all future tort cases, except in the comparatively unusual situations where there is state authority directly in point.

The substance of the panel's decision is that one joint tortfeasor may recover full indemnity against another, although neither is grossly negligent and both are guilty of active negligence, if one is more negligent than the other. The novelty and importance of the decision in this regard is underscored by the fact that, apart from the panel decision, there is absolutely no similar holding in collision cases, such as this one, where both parties are actively negligent.

Although the opinion expressly acknowledges that the common law will not, in the absence of contract, impose indemnity on one of two concurrently negligent wrongdoers, except where "their negligence is substantially different not merely in degree but in character" (Slip Opinion, pp. 29-30),[2] the panel awarded full indemnity to United on the ground that the government was more negligent than was United (*Id.*, pp. 31-32). The findings of the district court, affirmed by the panel on appeal, reflect that each crew was guilty of active negligence of the same character (*i.e.*, in failing to see and avoid the other airplane, *Id.*, p. 11; Find. 73), and that both United and the government were guilty of the same kind of active pre-flight negli-

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[2]For cases so holding, see, *e.g.*, *Union Stock Yards Co. v. Chicago B. & Q. R. Co.*, 1905, 196 U.S. 217, 224-226; *United States v. Acord*, 10 Cir. 1954, 209 F. 2d 709, 714-716 *cert. denied*, 347 U. S. 975.

gence, that is, sending their airplanes into an area which they knew might be dangerous because of the presence of other airplanes, without taking adequate precautionary measures (see, *Id.*, pp. 11-12). By imposing liability for the accident wholly upon one party in such circumstances, the panel has imported the doctrine of comparative negligence into the law of indemnity, a doctrine which is wholly foreign to the common law principles it purported to apply.[3] In so doing it has opened the door to the imposition of full indemnity in a whole host of vehicle collision cases in which indemnity has previously been denied.

2. In *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 1950, 183 F. 2d 902, this court recognized and applied the common law principle, set forth in Restatement, Restitution, §§ 95, 102, that one who has actual knowledge of a dangerous condition and does not act reasonably to remedy it, cannot recover indemnity from the person creating that dangerous condition. Yet the panel here awarded full indemnity to United, although sustaining the findings of the district court that United had actual knowledge of the "hazardous conditions," and two "near-misses" in the area of the collision, but continued to send its airplanes there without taking any precautionary crew training measures to lessen the risk (Slip Opinion, pp. 11-12). We submit that a rehearing *en banc* is necessary to reconcile the decision of the panel with the principles adopted in *Booth-Kelly Lumber Co., supra.*

3. Even if, contrary to our views, indemnity could properly be awarded on the basis of comparative degrees of negligence, the panel erred in weighing all of the government's acts of negligence, against only the negligence of the United crew in failing to see and avoid

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[3]See, *United States v. Acord, supra,* 209 F. 2d at 715; *Builders Supply Co. v. McCabe,* 1951, 366 Pa. 322, 77 A. 2d 368, 370.

the Air Force airplane (Slip Opinion, pp. 31-32). Although the opinion affirms that "United had knowledge" of the dangerous conditions in the Victor 8 airway near Las Vegas (*Id.,* pp. 11-12), and sent its airplanes there without taking any precautionary crew training measures, the opinion ignores these critical facts in weighing the comparative degree of fault (*Id.,* pp. 31-32). Rehearing is necessary to reconcile this internal inconsistency. Consideration of all of United's negligence suggests that the district court's finding that the parties were *in pari delicto* was not "clearly erroneous" as the panel ruled, but clearly correct.[4]

4. The panel relied in large part in its weighing of relative fault upon its belief that the Air Force pilot had in fact an opportunity to avoid the collision, but failed to do so (*Id.,* p. 31). Not only is that belief contrary to the facts, and the findings of the district court (particularly No. 73), but United never urged the issue in the district court, and did not raise it in this court until its reply brief. Yet in direct conflict with this court's recent ruling in *First Federal Savings & Loan Assn. v. United States,* 1961, 295 F. 2d 481, 482-483, the panel here has reversed the district court in large part on a factual issue which was "never framed for consideration by that court."

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[4]The opinion relies upon the fact that United's negligence consisted of a breach by United of a duty to exercise "the highest degree of care" (*Id.,* p. 31); but ignores the findings of the district court which it affirmed, that United violated not only that duty, but the duty to exercise ordinary care. *E.g.,* Finding 73, *"the crews in the exercise of ordinary care,* could and should have seen and taken the action necessary to avoid the collision" (emphasis added).

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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Certificate.

I certify that in my judgment this petition for rehearing is well founded and is not interposed for delay.

DONALD J. MERRIMAN
Assistant U. S. Attorney